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No. 85-175

In the Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT R. GARWOOD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was denied due process of law when, under the courts-martial system created by Congress pursuant to Article I, Section 8 of the Constitution, he was convicted upon the concurrence of at least two-thirds of a five-member court-martial.

2. Whether the military judge properly declined to recuse himself after making public comments about the trial where the court-martial members had no knowledge of the comments, the comments reflected neither bias nor prejudice against petitioner, and the comments did not otherwise prejudice petitioner's right to a fair trial.

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OPINIONS BELOW

The opinion of the United States Court of Military Appeals (Pet. App. 1a-14a) is reported at 20 M.J. 148. The opinion of the United States Navy-Marine Corps Court of Military Review (Pet. App. 15a-39a) is reported at 16 M.J. 863.

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on June 3, 1985. The petition for a writ of certiorari was filed on July 31, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. I) 1259(3).

STATEMENT

Petitioner, a member of the United States Marine Corps, was convicted by a general court-martial convened by the Commanding General, Marine Corps Base, Camp Lejeune,

North Carolina, of communicating with the enemy and assaulting an American prisoner of war, in violation of Articles 104 and 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. 904 and 928. The court-martial members sentenced petitioner to be dishonorably discharged from the naval service, to forfeit all pay and allowances, and to be reduced to private, pay grade E-1. The convening authority reviewed the case pursuant to Article 60, UCMJ, 10 U.S.C. 860, and approved the findings and sentence. The United States Navy-Marine Corps Court of Military Review, upon mandatory review pursuant to Article 66(b), UCMJ, 10 U.S.C. 866(b), affirmed the findings and sentence (Pet. App. 15a-39a). The United States Court of Military Appeals granted discretionary review, pursuant to Article 67(b)(3), UCMJ, 10 U.S.C. 867(b)(3), to consider two claims of error raised by petitioner.[1] That court also affirmed (Pet. App. 1a-14a).

1. The charges arose from petitioner's activities with the enemy between 1967 and 1969 after his unexplained disappearance from his Marine unit in the Republic of South Vietnam. During these two years, petitioner lived with the enemy, eating and sleeping outside the fenced compound where the enemy confined American prisoners of war. He

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[1]The two issues that the Court of Military Appeals agreed to review were (Pet. App. 2a (capitalization omitted)):

> [1.] Whether the military judge erred in refusing to recuse himself and in refusing to declare a mistrial as a result of judicial misconduct.
>
> [2.] Whether the prosecution of PFC Garwood, in violation of governmental policy not to prosecute prisoners of war who had violated the UCMJ, constituted selective prosecution, and therefore denied PFC Garwood due process of law and the equal protection of the laws, guaranteed by the Fifth Amendment to the United States Constitution

In this Court, petitioner does not raise any question concerning the second issue.

wore an enemy uniform and carried an enemy weapon and ammunition. Petitioner served as a guard over American prisoners of war, interrogated them, and required them to bow to him as a sign of respect. On one occasion, petitioner assaulted an American prisoner of war. In 1973, when the majority of American prisoners of war were repatriated, petitioner did not return. In 1979, following petitioner's encounter with a representative of the United Nations in North Vietnam, petitioner finally returned to United States military control. Pet. App. 2a, 16a, 18a-20a.

2. Pursuant to Article 25(d)(2), UCMJ, 10 U.S.C. 825(d)(2), the convening authority detailed ten officers who in his opinion were best qualified by reason of their age, education, training, experience, length of service, and judicial temperament to serve as members of petitioner's court-martial. Petitioner did not invoke his right under Article 25(c), UCMJ, 10 U.S.C. (& Supp. II) 825(c), to request the detail of enlisted members for his court-martial.

Petitioner filed a preliminary motion in which he requested a trial before a panel of 12 members and requested that the panel be instructed to render a unanimous verdict (Tr. 525-528). Both of these motions were denied. Thereafter, the panel of ten officers was subjected to extensive voir dire, as a result of which the court-martial was reduced to six members (Tr. 1157-1524). Later, following additional voir dire of three members, the military judge granted petitioner's challenge of one more member for cause, and thus the court-martial that tried petitioner ultimately consisted of five officers (Tr. 1594-1601).[2] At no time following his preliminary motion did petitioner renew his request for a larger panel, nor did he ever again request a unanimous verdict instruction.

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[2]Article 16(1)(A) of the UCMJ, 10 U.S.C. 816(1)(A), provides that a general court-martial shall consist of a minimum of five members.

At the conclusion of the trial, the five members, by secret written ballot, with at least two-thirds of the members concurring in each finding, found petitioner guilty on both charges. The sentence imposed by the members was determined in the same manner.[3]

On appeal, the United States Navy-Marine Corps Court of Military Review rejected without discussion petitioner's argument that his conviction by the concurrence of at least two-thirds of a five-member court martial had denied him a fair and impartial jury in violation of his Fifth and Sixth Amendment rights. The United States Court of Military Appeals, while granting review on two other issues, declined to grant discretionary review on this issue (see note 1, *supra*).

3. This was a highly publicized case. Sensitive to both the media demands for information and the potential impact of publicity on petitioner's right to a fair trial, the military judge issued a written judicial order on the first day of trial prohibiting out-of-court statements by all persons involved in the trial (Pet. App. 22a-23a). However, the military judge "strongly believe[d] in the public's right * * * to be informed" as to matters of public interest, court cases, and how public officials conduct business (Tr. 3827). In keeping with this view, the military judge, during the period December 1980 through February 1981, engaged in

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[3]Article 51(a) of the UCMJ, 10 U.S.C. 851(a), requires that voting by members be by secret written ballot. Article 52(a)(2) of the UCMJ, 10 U.S.C. 852(a)(2), requires that a finding of guilty be by the concurrence of two-thirds of the members present at the time the vote is taken. (Even when more than the required two-thirds of the members vote to convict, that fact is not announced.) Article 52(b)(3) of the UCMJ, 10 U.S.C. 852(b)(3), likewise requires that a sentence that does not include death, life imprisonment, or confinement for more than ten years be determined by the concurrence of at least two-thirds of the members present at the time the vote is taken.

a number of interviews with local and national media representatives to explain military law and his court rulings (Tr. 2880, 3828). The military judge made his remarks during interviews outside the courtroom and during appearances on a CBS evening television news program and ABC's "Nightline" program (Pet. App. 23a-24a).

The majority of the military judge's comments concerned the length and schedule of hearings, the military judge's rulings on trial matters that were already in the public record, and explanations of military justice procedures that had already been discussed in open court (Tr. 2880). However, the United States Navy-Marine Corps Court of Military Review stated (Pet. App. 24a) that some of the trial judge's remarks

> involved the expression of his opinion regarding tactical decisions by the [petitioner's] defense team; the relevancy of certain defense discovery items; comments, delivered to the media, which could be interpreted as disparaging the testimony of one of the [petitioner's] psychiatrists; and opinions expressing the view that [petitioner] should take the stand and testify regarding the charges.

The military judge specifically contested the accuracy of the media reports of his remarks (Tr. 2861-2866).

After the military judge's initial public remarks, petitioner's civilian counsel moved for dismissal of the charges or, alternatively, for recusal of the military judge (Pet. App. 24a). Alleging a lack of impartiality on the part of the military judge, petitioner relied on the pertinent military standard for testing the suitability of a judge to preside. See *Manual for Courts-Martial, United States—1969* ¶ 62f (rev. ed.), reprinted at Pet. App. 5a-6a.

In response to petitioner's motion, the members were subjected to extensive voir dire. That process revealed that the members had no conscious knowledge of the military

judge's out-of-court comments. As the United States Navy-Marine Corps Court of Military Review stated (Pet. App. 27a):

> [W]e find, after examining the extensive *voir dire* of the court members; their candid responses regarding attempts by press representatives to interview them; their rebuffs of such attempts; their adamant statements denying both any knowledge or contact with press, radio, or television reports of the case throughout their period of appointment to the court and their denial of any individual, social, or other contact or discussions regarding the case, no indication of prejudicial impact on the members of the court.

Having failed to establish any actual prejudice, petitioner sought to present evidence on the psychological concept of "subliminal perception" to establish that the military judge's comments could have affected the members unconsciously. The military judge refused to consider the proffered evidence, and he denied the motion to dismiss the charges and declined to recuse himself. Pet. App. 8a, 24a, 27a.

Later in the trial, following closing arguments on findings, petitioner's counsel again challenged the trial judge for cause and moved for a mistrial alleging bias against petitioner and judicial misconduct. After additional voir dire by counsel and the military judge revealed that the members still had no knowledge of the military judge's remarks, the military judge denied the defense challenge and motion for a mistrial. The trial resumed and was carried through to conclusion. Pet. App. 24a.

ARGUMENT

The importance of this prosecution lies in its reaffirmation of a principle that has immeasurable impact on military discipline: An American serviceman is always accountable for his actions, even as a prisoner of war. However, this case

does not raise any important issues of law. The issues petitioner presents for review are common and familiar to the military justice system. Moreover, this Court recently denied a petition for a writ of certiorari that raised a virtually identical challenge to the size and unanimity requirements of the courts-martial system. See *Hutchinson* v. *United States*, cert. denied, No. 84-254 (Nov. 5, 1984). Accordingly, further review is not warranted.

1. a. Relying on *Ballew* v. *Georgia*, 435 U.S. 223 (1978) (opinion of Blackmun, J.) (holding that five-person juries in nonpetty criminal cases violate the Sixth Amendment as made applicable to the states by the Fourteenth Amendment), and *Burch* v. *Louisiana*, 441 U.S. 130 (1979) (holding that nonunanimous verdicts by six-person juries in nonpetty criminal cases violate the Sixth and Fourteenth Amendments), petitioner contends that his conviction by a possibly non-unanimous five-member court-martial must be set aside. Petitioner's attack on the size and unanimity requirements established by Congress for courts-martial should be rejected.[4]

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[4]It bears noting that, throughout these proceedings, petitioner has failed to present any consistent theory in support of his attack on the size of the court-martial and the absence of a requirement for a unanimous verdict. At trial, petitioner argued that the reliability of the truth-finding process is adversely affected by anything less than a unanimous decision of 12 people. But petitioner did not ask for a minimum of at least six jurors, nor did he request that the five members actually empanelled reach a unanimous verdict. It is especially significant that petitioner did not seek an increase in the size of the panel following the grant of his final challenge for cause, which was the event that led to his trial by a five-member court.

In his assignment of errors to the United States Navy-Marine Corps Court of Military Review, petitioner abandoned the position that 12 members are constitutionally required (a concession necessarily required by *Williams* v. *Florida*, 399 U.S. 78 (1970)), but he did not state what size panel should be required. The Court of Military Review rejected petitioner's abstract and amorphous argument without discussion. Similarly, the United States Court of Military Appeals refused even to consider the issue. See note 1, *supra*.

Under the guise of a Fifth Amendment due process claim, petitioner seeks to impose on the courts-martial system requirements this Court has found inherent in the Sixth Amendment's guarantee of a trial by jury. But petitioner concedes (Pet. 10 n.18), as he must, that he has no Sixth Amendment right to a jury trial. This Court has held in an unbroken line of cases stretching back to *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), that the jury trial guarantee of the Sixth Amendment is not available to the military accused.[5] In *Milligan*, the Court held that armed forces personnel, expressly exempted from the Fifth Amendment right of indictment, are also exempted, by necessary implication, from the Sixth Amendment right to trial by jury. 71 U.S. (4 Wall.) at 123. In *Ex parte Quirin*, 317 U.S. 1 (1942), the Court noted that neither the Sixth Amendment nor Article III, Section 2 of the Constitution requires trial by jury in the armed forces. The Court concluded that neither provision was intended to enlarge the right to trial by jury as it existed at the time of enactment of the Constitution and the Bill of Rights. Rather, the Framers intended (317 U.S. at 39 (emphasis added)):

> to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law * * *, but *not* to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right.

The legislative history available to interpret the jury trial guarantee admits of only one construction: it was never

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[5] *O'Callahan* v. *Parker*, 395 U.S. 258 (1969); *Reid* v. *Covert*, 354 U.S. 1 (1957); *Whelchel* v. *McDonald*, 340 U.S. 122, 127 (1950); *Ex parte Quirin*, 317 U.S. 1, 8 (1942); *Kahn* v. *Anderson*, 255 U.S. 1 (1921).

intended to apply to the military.[6] The military courts have relied on this construction and have repeatedly rejected the precise contention raised by petitioner here.[7]

b. Petitioner's argument fares no better when viewed as a Fifth Amendment due process claim. Neither *Burch* nor *Ballew* dealt with Congress's power to create rules for courts-martial pursuant to Article I, Section 8 of the Constitution, a power that is *independent* of Article III, Section 2, and the Fifth and Sixth Amendments.[8] Moreover, neither case dealt with the fundamental matter of the separate nature of military society.

This Court has long recognized the special deference due to judgments made by Congress in the exercise of its power to "make Rules for the Government and Regulation of the land and naval Forces" (U.S. Const. Art. I, § 8, Cl. 14). As the Court stated in *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953) (footnote omitted):

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[6]See generally Van Loan, *The Jury, the Court-Martial, and the Constitution*, 57 Cornell L. Rev. 363 (1972); see also Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293 (1957).

[7]*United States* v. *Rojas*, No. 81-2109 (N.-M.C.C.M.R. Aug. 23, 1984); *United States* v. *Seivers*, 9 M.J. 612 (A.C.M.R.), pet. granted on other grounds, 9 M.J. 253 (C.M.A.), aff'd, 9 M.J. 397 (C.M.A. 1980); *United States* v. *Yoakum*, 8 M.J. 763 (A.C.M.R.), pet. granted on other grounds, 9 M.J. 137 (C.M.A.), aff'd, 9 M.J. 417 (C.M.A. 1980); *United States* v. *Guilford*, 8 M.J. 598 (A.C.M.R. 1979), pet. denied, 8 M.J. 242 (C.M.A. 1980); *United States* v. *Montgomery*, 5 M.J. 832 (A.C.M.R. 1978), pet. denied, 6 M.J. 89 (C.M.A. 1978). The Court of Military Appeals has ruled contrary to petitioner's argument on similar issues. See *United States* v. *Morphis*, 7 C.M.A. 748, 23 C.M.R. 212 (1957); *United States* v. *Walker*, 7 C.M.A. 669, 23 C.M.R. 133 (1957).

[8]*Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234, 246 (1960); *id.* at 272-273 (opinion of Whittaker, J.); *Reid* v. *Covert*, 354 U.S. 1, 19-39 (1957) (plurality opinion); *id.* at 42 (Frankfurter, J., concurring); *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65 (1857).

> [T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers especially entrusted that task to Congress.[9]

Especially heightened deference is due Congress's judgments in this area when the practices at issue date back to the earliest days of our Nation. From the adoption of the American Articles of War of 1776 until the enactment of the Uniform Code of Military Justice in 1950, conviction required only the concurrence of a simple majority of a court-martial panel. Section XIV, Art. 5, American Articles of War of 1776, *reprinted in* 5 Journals of the Continental Congress 801 (Ford ed. 1906) [hereinafter cited as *Journals*]. Since the adoption of the UCMJ, conviction has required the concurrence of two-thirds of the panel. Art. 52(a)(2), UCMJ, 10 U.S.C. 852(a)(2). Unanimity has never been required, except in those cases in which death is the mandatory sentence. Art. 52(a)(1), UCMJ, 10 U.S.C. 852(a)(1). It is also worth noting that, in the naval service, the practice of detailing five members to a court-martial in a capital case, and three in a noncapital case, is of very long standing. In 1782, Congress substantially adopted the then-current British practice of naval courts-martial. Congress provided for the structure of the court-martial panel itself, stating (7 *Journals* 325):

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[9]Accord *Chappell* v. *Wallace*, 462 U.S. 296, 300-304 (1983); *Middendorf* v. *Henry*, 425 U.S. 25, 43-48 (1976); *Parker* v. *Levy*, 417 U.S. 733 (1974); *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955); *Reaves* v. *Ainsworth*, 219 U.S. 296 (1911); *In re Vidal*, 179 U.S. 126 (1900); *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65 (1857).

> [A] marine court of enquiry or court-martial for enquiring into or trying of all capital cases, shall consist of at least five commissioned navy and marine officers, two of whom shall be captains, and in all cases not capital it shall consist of three such officers, one of which shall be a captain in the navy of the United States.

History demonstrates that these provisions are no accident but instead represent Congress's considered judgment on the balance to be struck between the rights of the individual and the special requirements of the armed forces. For example, Section XIV, Article 1 of the American Articles of War of 1776 provided that at least 13 officers were required for all general courts-martial. 5 *Journals* 800. After the cessation of hostilities with Britain, the Army was faced with large numbers of desertions and an understaffing of officers. The problem became particularly acute at frontier outposts. In 1786, the commander of one of these small outposts convened a court-martial composed of only five officers to consider charges of desertion placed against two soldiers. Both men were convicted, and both were sentenced to death. The court-martial as constituted was illegal, but Congress was sympathetic with the commander's plight. In 1786, the Articles were changed to permit a quorum of five officers at a general court-martial and three officers at a regimental court-martial. 30 *Journals* 145; see Van Loan, *The Jury, the Court-Martial, and the Constitution*, 57 Cornell L. Rev. 363, 384-385 n.118 (1972).

It was thus Congress's experience with military exigencies and the necessity for maintaining small, remote units, conditions that exist even today, that heavily influenced the structure of the court-martial panel. In enacting the UCMJ, Congress had a rational basis, rooted in two centuries of

precedent and experience, for rejecting the size and unanimity requirements demanded by petitioner.[10] The essential business of the military is, after all, "to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955). Courts-martial, while of critical mportance to the maintenance of discipline, are a decidedly secondary function. *Ibid.* "To the extent that those responsible for performance of this primary [fighting] function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served." *Ibid.* In these circumstances, Congress could rationally conclude that diversion of the additional resources necessary to conduct any retrials that might be occasioned by a unanimous verdict requirement is too high a price

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[10] Congress considered testimony in favor of a unanimous verdict requirement before the UCMJ was enacted. *Uniform Code of Military Justice (No. 37): Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 757 (1949) (testimony of Col. Oliver). Articles 16 and 52 were nevertheless adopted in substantially their present form. Moreover, since the UCMJ was enacted, Congress has considered but not enacted at least three bills that would have specifically required unanimous verdicts. H.R. 7263, H.R. 7292, H.R. 7467, 92d Cong., 1st Sess. (1971).

In the 22 instances since 1950 when bills have been enacted by Congress changing various sections of the UCMJ, Congress has never seen fit to change the provisions at issue in this case. Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 *et seq.*; Act of Oct. 12, 1982, Pub. L. No. 97-295, § 1(12) and (13), 96 Stat. 1289; Military Justice Amendments of 1981, Pub. L. No. 97-81, §§ 1-6, 95 Stat. 1085-1089; Military Pay and Allowances Benefits Act of 1980, Pub. L. No. 96-579, § 12(a), 94 Stat. 3369; Defense Officer Personnel Management Act, Pub. L. No. 96-513, § 511(24) and (25), 94 Stat. 2922; Department of Defense Authorization Act, 1980, Pub. L. 96-107, § 801(a) and (b), 93 Stat. 810 and 811; Act of Oct, 18, 1976, Pub. L. No. 94-550, § 3, 90 Stat. 2535; Military Justice Act of 1968, Pub. L. No. 90-632, § 2, 82 Stat. 1335; Act of June 15, 1968, Pub. L. No. 90-340, 82 Stat. 178 *et seq.*; Act of Dec. 8, 1967, Pub. L. No. 90-179, § 1, 81 Stat. 545; Act of Nov. 2, 1966, Pub. L. No. 89-718, § 8(a), 80 Stat. 1117; Department of Transportation Act, Pub. L. No. 89-670, § 10(g), 80 Stat. 948; Government Employees Salary Reform Act of 1964, Pub. L. No. 88-426, § 403(j), 78 Stat. 434; Act of Sept. 7, 1962, Pub. L. No. 87-651, § 104, 76 Stat. 508;

to pay in terms of lost military preparedness.[11] Petitioner has not demonstrated the "extraordinarily weighty" considerations necessary to overcome this long-standing congressional judgment. *Middendorf* v. *Henry*, 425 U.S. 25, 44 (1976).[12]

Act of Sept. 7, 1962, Pub. L. No. 87-648, 76 Stat. 447 *et seq.*; Act of Oct. 4, 1961, Pub. L. No. 87-385, 75 Stat. 814 *et seq.*; Act of July 12, 1960, Pub. L. No. 86-633, 74 Stat. 468 *et seq.*; Hawaii Omnibus Act, Pub. L. No. 86-624, § 4(b), 74 Stat. 411; Act of July 5, 1960, Pub. L. No. 86-589, 74 Stat. 329 *et seq.*; Alaska Omnibus Act, Pub. L. No. 86-70, § 6(b), 73 Stat. 142; Act of Sept. 2, 1958, Pub. L. No. 85-861, § 33(a) and (b), 72 Stat. 1564 and 1566; Act of Aug. 10, 1956, ch. 1041, 70A Stat. 1 *et seq.*

[11]The importance to the military justice system of avoiding retrials is highlighted by the fact that the system does not provide for "hung juries." See Rule 921(c)(3), *Manual for Courts-Martial, United States—1984*. If there are not the necessary votes for conviction, the accused is acquitted, even though half or more of the members of the court-martial may be persuaded beyond a reasonable doubt of his guilt. If Congress were compelled to require unanimous verdicts for conviction, it might find itself forced as well to import the civilian concept of retrials after hung juries, to the potential detriment of military efficiency.

[12]As this Court has consistently noted, many of the substantial constitutional rights enjoyed in the civilian community do not exist in our system of military justice absent congressional direction to that end. See *Middendorf* v. *Henry*, 425 U.S. at 33-34, 42-43, 46-48; *Schlesinger* v. *Councilman*, 420 U.S. 738, 746, 757-760 (1975); *Parker* v. *Levy*, 417 U.S. 733, 743-752 (1974); *Gosa* v. *Mayden*, 413 U.S. 665, 672-678 (1973); *Relford* v. *Commandant*, 401 U.S. 355, 362-363, 367-369 (1971); *O'Callahan* v. *Parker*, 395 U.S. 258, 261-264 (1969). At the same time, however, it is important to note that while Congress has not chosen to grant the military accused the right to trial by jury, it has established independent safeguards against unjustified convictions. No charge may be referred to a general court-martial for trial without an impartial investigation into the evidence supporting the charge. Art. 32, UCMJ, 10 U.S.C. 832. This procedure includes the right of the accused to be represented by counsel. A convening authority may not refer a charge to a general court-martial for trial without independently assessing the sufficiency of the evidence. Art. 34(a), UCMJ, 10 U.S.C. (Supp. II) 834(a). The Court of Military Review may not affirm findings of

c. The Court based its decision in *Ballew* on empirical studies of the group dynamics of civilian juries (435 U.S. at 231-243 (opinion of Blackmun, J.)), and much the same reasoning formed the basis for the decision in *Burch* (441 U.S. at 138). No comparable studies exist for court-martial panels. Nevertheless, it seems quite likely that the make-up of a court-martial is sufficiently different from that of a civilian jury that the available studies cannot form the basis for any reliable conclusions about the deliberative processes of courts-martial.[13] For example, unlike civilian juries selected at random to represent a cross-section of the community, court martial members are deliberately chosen on the basis of who is best qualified to sit as a member. Art. 25, UCMJ, 10 U.S.C. (& Supp. II) 825.[14] The result is a body far more homogenous than the typical civilian jury and hence one that is likely to be influenced by quite different factors from those found significant in the studies of civilian juries.

The important question, however, is not whether the studies relied upon in *Ballew* shed light on the issue presented by petitioner, but whether this Court should take on

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guilt unless it is independently convinced of the accused's guilt beyond a reasonable doubt, Art. 66(c), UCMJ, 10 U.S.C. 866(c), and the accused may seek review of that decision by the Court of Military Appeals, a panel of three civilian judges. Art. 67, UCMJ, 10 U.S.C. (& Supp. II) 867. See generally *United States* v. *Boland*, 1 M.J. 241 (C.M.A. 1975); Moyer, *Procedural Rights of the Military Accused: Advantages over a Civilian Defendant*, 22 Me. L. Rev. 105 (1970).

[13]Petitioner relies (Pet. 11 n.19) on the opinion of Professor Saks (Pet. App. 40a-43a) to the effect that conclusions drawn from studies of civilian juries should be transferable to courts-martial panels. But Professor Saks admits (*id.* at 41a, 43a) that he knows of no comparable studies involving military populations, and he further acknowledges (*id.* at 43a) that military populations could produce different results.

[14]At trial, petitioner's counsel acknowledged that the requirements applicable to the selection of court-martial members may result in "more of a blue-ribbon jury than you get in a civilian population" (Tr. 525).

the task of considering the dynamics of group decisionmaking by courts-martial. More than sociology is involved here; the asserted rights of the military accused must be balanced against the special and unique institutional needs of the armed forces. In light of the special deference due to Congress's judgments in this area, as well as Congress's generally superior fact-finding capabilities, we submit that that body, rather than civilian courts, should have the responsibility to consider the question whether studies of the type relied upon in *Ballew* ought to form the basis for any change in the UCMJ.[15] As we have noted (see note 10, *supra*), Congress has considered but not enacted bills calling for unanimous guilty verdicts by courts-martial. The appropriate forum for resolution of petitioner's sociological arguments is therefore the Legislative Branch.

2. a. For the first time in this case, petitioner asserts (Pet. 14) that "the military judge's misconduct reasonably raised such serious questions about the fairness and integrity of the trial proceedings that petitioner's right to due process was violated."[16] Because petitioner did not make this constitutional argumen below, neither the rulings of

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[15]An excellent analysis of the separate nature of military society, past and present, and the reasons why Congress is the branch of government most adept at dealing with military justice, is contained in Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C.L. Rev. 177 (1984).

[16]At trial, petitioner requested that the military judge recuse himself and challenged the military judge for cause (Tr. 2845). The "focus of this challenge" was an alleged lack of impartiality on the part of the military judge (Tr. 2884). Petitioner's legal authority for this allegation was the *Manual for Courts-Martial, United States—1969* ¶ 62f (rev. ed.). This was the pertinent military standard at the time of petitioner's trial for testing the suitability of a judge to sit on a particular case (Tr. 2881).

On appeal, petitioner relied on this same legal authority to challenge the propriety of the military judge's decision not to recuse himself. In neither military appellate court did petitioner allege a violation of due process.

the military judge nor the opinions of the military appellate courts address the constitutional issue. In these circumstances, review by this Court would be inappropriate. See, *e.g.*, *County of Oneida* v. *Oneida Indian Nation*, No. 83-1065 (Mar. 4, 1985), slip op. 16-17.

b. In any event, petitioner's challenge to the actions of the military judge does not raise any substantial constitutional question. At trial and on appeal, petitioner challenged the suitability of the military judge to preside based on well-recognized principles of military and civilian jurisprudence. Petitioner had the burden to establish that the military judge abused his discretion in denying petitioner's challenges to the judge's impartiality and in refusing to grant a mistrial. *United Stated* v. *Rosser*, 6 M.J. 267 (C.M.A. 1979); *United States* v. *Thompson*, 5 M.J. 28 (C.M.A. 1978); *United States* v. *Talbott*, 12 C.M.A. 446, 31 C.M.R. 32 (1961); *Manual for Courts-Martial, United States—1969* ¶ 62h (rev. ed.). Both military appellate courts rejected petitioner's fact-bound contention and concluded that the military judge appropriately denied petitioner's challenge for cause and motion for a mistrial. The lower courts' resolution of this question is not of sufficient general importance to warrant this Court's review.

The United States Court of Military Appeals correctly concluded that petitioner received a fair trial notwithstanding the military judge's public comments, for the record establishes that the members were unaware of the comments. In evaluating the degree and type of prejudicial publicity that is necessary in order to find a constitutionally unfair trial, this Court has stated that it will entertain a presumption of prejudice due to trial or pretrial publicity only in cases in which "the influence of the news media, either in the community at large or in the courtroom itself, [so] pervade[s] the proceedings" that the trial itself becomes " 'but a hollow formality.' " *Murphy* v. *Florida*, 421 U.S. 794, 799 (1975) (citation omitted).

In the instant case, there was no prejudice to petitioner from the military judge's remarks. Petitioner has been unable to establish either at trial or on appeal that the military judge's remarks had any effect on the members. Indeed, petitioner's counsel conceded on appeal that "there is no evidence that any of the court members ever *consciously* heard or read any description or accounts of the military judge's off-the-record remarks" (Pet. App. 8a). Throughout the trial and appellate proceedings, petitioner argued instead that subconscious or "subliminal perceptions"—information received without the recipient's knowledge—would tend to have a substantial impact on the opinion and judgment of the court members. The trial judge and both appellate courts correctly rejected this speculative argument in favor of the "forthright assertions of the court members that they scrupulously observed the judge's standing order to avoid all discussion, contact with, or proximity to news reports, conversations, or press notices regarding the case" (*id.* at 27a; see also *id.* at 7a-8a).

These conclusions were based on detailed individual voir dire of all members. When the voir dire established that the members had no knowledge of any public comments about the trial, petitioner did not challenge any of the members. Furthermore, the military judge then individually instructed each member to guard against publicity. Moreover, the military judge repeatedly asked the members during the course of trial whether they had any knowledge of publicity in this case and repeatedly offered the defense an opportunity to voir dire the members. Tr. 2851-2857, 3477-3478, 3663-3667, 3761-3762. These actions by the military judge ensured that the members did not at any time learn of the public discussion of the case. Petitioner's counsel even stated "we've got a fair jury chosen" and "[w]e do not want to start over under any circumstances" (Tr. 2849). This concession at trial militates against petitioner's belated

challenge to the fairness of his trial. Petitioner asks this Court to make a third review of the lengthy record of trial to see if it can find what two other appellate courts have been unable to find—proof of any prejudice to his case by the military judge's out-of-court comments. His invitation should be declined.

c. We note also that the military judge's public statements and his statements at trial demonstrate that he had no bias against petitioner and that his comments did not create a perception of unfairness. The majority of his public comments were permissible and concerned the length and schedule of hearings, his rulings on trial matters that were already in the public record, and explanations of military justice procedures. Even the judge's improper remarks (see Pet. App. 24a) about defense trial tactics did not reveal any unfairness or bias.[17] Indeed, the military judge's expression of sympathy for petitioner at trial demonstrates his fairness and impartiality in this proceeding.[18]

d. Finally, the standards for a military judge's relationship with the press are unequivocally clear, and there is no need for this Court to clarify those standards. Canon 3(A)(6) of the ABA's Code of Judicial Conduct (1972) and Standard 8-2.1 of the ABA's Standards on Fair Trial and

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[17]How remarks of this nature, even if improper, could achieve significant "subliminal" effect on the members of the court-martial even if they penetrated their subconscious is baffling.

[18]At the conclusion of trial, the military judge made a poignant comment about his personal feelings toward the accused (Tr. 3826):

> Now, in all honesty, I would have to say that while I had no personal opinion as to the guilt or innocence of the accused, I cannot deny that I had a great deal of sympathy for the accused, and I think I have expressed that on any number of occasions, both in court and out of court. But I tried not to allow that personal sympathy and empathy to interfere with any rulings or determinations that I made in the case * * *.

Free Press (1980) define the permissible scope of public discussion of an ongoing trial by a sitting judge. Equally important, both military appellate courts in this case concluded that the military judge's public comments were improper. The Court of Military Review found that the military judge's conduct was "inexcusable" and expressed its "upmost [*sic*] disapproval" of the military judge's violation of judicial standards (Pet. App. 25a, 26a). Similarly, the Court of Military Appeals stated (*id.* at 6a) that the military judge's "comments exceeded the permissible scope of public discussion of an on-going trial by a sitting judge; and quite properly, the Court of Military Review * * * has chastised him." This explicit criticism of the military judge's mistake in these two opinions reinforces the standards for judicial conduct. No action by this Court is necessary to reaffirm the obvious.

The military judge's mistake in this case was an isolated incident, in no way indicative of a systemic problem in either the military or civilian justice system. There are no other reported military cases involving improper public comments about a case, and only a few reported federal decisions involve this issue. See, *e.g.*, *United States* v. *Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977).

In summary, although the public comments by the military judge were injudicious, these comments did not so pervade the trial that it became a "hollow formality." The statements themselves did not reveal any personal bias or prejudice on the part of the military judge, and the members had no knowledge of the remarks. Therefore, the military judge properly denied the challenge for cause and the motion for mistrial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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